



Signed and Filed: April 22, 2011

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re) Case No. 11-30646 TEC
WILLIAM D. PHILLIPS,) Chapter 11
Debtor.)

**MEMORANDUM TO CORRECT HARMLESS FACTUAL ERROR IN THE COURT'S
APRIL 6, 2011 ORDER DENYING DEBTOR'S MOTION FOR RECONSIDERATION**

This memorandum corrects a factual error in the court's April 6, 2011 Order Denying Debtor's Motion for Reconsideration. Because the court's error was harmless, the court determines that entry of an amended order denying Debtor's motion for reconsideration is unnecessary.

FACTS

Debtor William D. Phillips, an individual, filed a previous bankruptcy case, Case No. 11-30273, that was dismissed on February 18, 2011. Three days later, on February 21, 2011, Debtor filed the above-captioned bankruptcy case.

Because Debtor had a prior case dismissed within the previous year, the automatic stay would have expired 30 days after the

MEMORANDUM TO CORRECT FACTUAL ERROR
IN THE COURT'S ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION

1 petition date, had Debtor not moved to extend the stay. On
2 February 25, 2011, Debtor filed, served on all creditors, and set
3 for hearing on March 14, 2011 a motion to extend the automatic
4 stay.

5 On February 25, 2011, Pensco FBO Hong Zheng Acct #ZH001
6 (Pensco), holder of a second deed of trust on the real property
7 commonly known as 1704-1706 Church Street, San Francisco, CA (the
8 Property), filed a motion to terminate the automatic stay with
9 respect to the interests of Debtor and the estate in the Property.
10 The motion for relief from stay was set for hearing on March 14,
11 2011.

12 On March 11, 2011, Debtor filed opposition to Pensco's motion
13 for relief from stay, asserting that the Property was necessary for
14 Debtor to reorganize and that Debtor would make adequate protection
15 payments re the Property.

16 On March 11, 2011, Wells Fargo Bank, N.A., Indenture Trustee
17 for the Grand Pacific Business Loan Trust 2005-1 Notes (Wells
18 Fargo), holder of a first deed of trust on the Property, filed and
19 properly served a motion to terminate the automatic stay with
20 respect to the interests of Debtor and the estate in the Property,
21 and for a waiver of the 14-day stay provided by Bankruptcy Rule
22 4001(a)(3). A hearing on Wells Fargo's motion for relief from stay
23 was set for March 28, 2011 at 1:00 p.m.

24 On the record at the March 14, 2011 hearing on Debtor's motion
25 to extend the automatic stay and Pensco's motion for relief from
26 stay, the court granted Debtor's motion to extend the stay as to
27 all creditors, and ordered Debtor to make adequate protection
28 payments to Pensco and Wells Fargo.

MEMORANDUM TO CORRECT FACTUAL ERROR
IN THE COURT'S ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION

1 On March 28, 2011, the court held a hearing on Wells Fargo's
2 motion for relief from stay. Neither Debtor nor his counsel filed
3 opposition to Wells Fargo's motion or appeared at the hearing
4 thereon. The court granted Wells Fargo's motion for relief from
5 stay as unopposed.

6 On March 28, 2011, the court signed a stipulated form of
7 adequate protection order lodged re Pensco's motion for relief from
8 stay (the Pensco Order). The Pensco Order required Debtor,
9 beginning April 1, 2011, to make postpetition payments to Pensco
10 and to Wells Fargo. The Pensco Order further provided as follows:

11 IT IS FURTHER ORDERED the Secured Creditor shall
12 have relief from the automatic stay to the same extent
13 that any senior lienholder obtains relief from the
automatic stay upon the entry of the Order by the senior
lienholder granting it relief from stay.

14 IT IS FURTHER ORDERED that if the automatic stay is
15 terminated, it is terminated for all of the Secured
16 Creditor's foreclosure remedies, without the requirement
of further notice or publication, except as may be
required by state law.

17 Docket No. 48, p. 3: 9-14.

18 On March 30, 2011, the court signed an order granting Wells
19 Fargo's unopposed motion for relief from the automatic stay (the
20 Wells Fargo Order) and overriding the Fed. R. Bankr. Proc.
21 4001(a)(3) stay.

22 On March 31, 2011, Debtor filed an ex parte motion for
23 reconsideration of the Wells Fargo Order, contending that counsel
24 for Debtor inadvertently failed to appear at the hearing, that the
25 failure of counsel to appear was not Debtor's fault, and that
26 Debtor planned to restructure the third deed of trust against the
27 Property, and to surrender two real properties with negative net
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MEMORANDUM TO CORRECT FACTUAL ERROR
IN THE COURT'S ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION

1 operating income. Debtor did not set the motion for
2 reconsideration for hearing.

3 On April 4, 2011, Wells Fargo filed opposition to the ex parte
4 motion for reconsideration, contending that the motion was
5 procedurally defective because it was not set for hearing and that
6 it failed to set forth any basis for reconsideration other than
7 counsel's inadvertent failure to appear at the hearing on Wells
8 Fargo's motion for relief from stay, which did not constitute a
9 sufficient basis to reconsider the Wells Fargo Order.

10 On April 6, 2011, at 11:54 a.m. Debtor filed a second ex parte
11 motion for reconsideration of the Wells Fargo Order, arguing again
12 that the failure of counsel to appear at the hearing on Wells
13 Fargo's motion for relief was stay was due to inadvertence.

14 On April 6, 2011 at approximately 2:00 p.m., a nonjudicial
15 foreclosure sale of the Property was held and Pensco foreclosed on
16 the Property.

17 On April 6, 2011 at 3:35 p.m., Debtor filed a notice of
18 hearing on the April 6, 2011 motion for reconsideration, setting
19 the motion for hearing on April 7, 2011 at 10:30 a.m. Debtor
20 asserted in the accompanying motion for order shortening time that,
21 on information and belief, Wells Fargo intended to conduct a
22 foreclosure sale on April 7, 2011. The court first learned of the
23 motion for reconsideration and Debtor's request for order
24 shortening time at approximately 3:40 pm. on April 6, 2011.

25 On April 6, 2011, at approximately 4:00 p.m., this court
26 signed an Order Denying Debtor's Motion for Reconsideration of the
27 Wells Fargo. The Order erroneously denied the Motion on the basis
28 that Debtor had not sought an extension of the automatic stay

MEMORANDUM TO CORRECT FACTUAL ERROR
IN THE COURT'S ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION

1 following dismissal of his prior case, and that the automatic stay
2 had therefore terminated by operation of law.

3 **DISCUSSION**

4 The court first learned of Debtor's motion to reconsider the
5 Wells Fargo Order after Pensco had already foreclosed upon the
6 Property. The court addressed the motion promptly, but denied the
7 motion on the erroneous basis that the automatic stay had
8 terminated by operation of law. The court should have denied the
9 motion on the basis that the foreclosure sale had already occurred
10 and that, therefore, the hearing Debtor sought on the motion was
11 untimely. Because the motion for reconsideration properly could
12 have been denied as untimely, the factual error in the court's
13 order denying Debtor's motion for reconsideration was harmless.
14 Accordingly, there is no basis to vacate the order denying Debtor's
15 motion for reconsideration.

16 ****END OF MEMORANDUM****

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MEMORANDUM TO CORRECT FACTUAL ERROR
IN THE COURT'S ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION

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Court Service List

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